IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1136

MURRAY TILLMAN, ET AL.,

Petitioners,

v.

WHEATON HAVEN RECREATION ASSOCIATION, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR E. RICHARD McINTYRE, RESPONDENT

QUESTIONS PRESENTED

The courts below have held the Wheaton-Haven Recreation Association, Inc., to be a private club and hence exempt from coverage under the civil rights statutes (42 U.S.C. 1981, 1982 and 2000a) which prohibit racial discrimination. In the petition for a writ of certiorari (at 2), the sole question is whether the holdings in this case are in essential conflict with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

This respondent, E. Richard McIntyre, neither supports nor opposes the grant of certiorari on this issue, but submits the following additional questions for the Court's consideration:

1. Whether judgment was properly entered in favor of a director of the Wheaton-Haven Recreation Association, Inc., who was opposed to the policy of racial discrimination attributed to the corporation.

2. Whether an action against a corporation and its directors abates or is rendered moot as to a director removed from office for opposition to the policy of racial discrimination attributed to the corporation.

STATEMENT OF THE CASE

Petitioners brought this action to compel Wheaton-Haven, a non-profit corporation which operates a member-owned community swimming pool, to extend membership and guest privileges without racial discrimination. Suit was brought as a class action* seeking declaratory and injunctive relief, as well as damages, against Wheaton-Haven and 13 of its officers and directors.

This respondent, E. Richard McIntyre, was joined to this action solely because he served on the board of directors when Wheaton-Haven adopted the discriminatory policy complained of. No individual act of discrimination was attributed to him personally. The complaint, as twice amended (R. 185), sought to visit collective liability upon the officers and/or directors, based upon the alleged de-

* The asserted right to Petitioners to prosecute their claims as a class action was challenged below. No determination has been made under the provisions of Rule 23(c)(1), Federal Rules of Civil Procedure.

cision of the board of directors to withhold membership and guest privileges from Negro applicants.

In the District Court, McIntyre filed a timely motion to dismiss the action as to him or, in the alternative, for summary judgment (R. 224), urging *inter alia* the failure of the complaint to state a claim against him individually. In support of summary judgment McIntyre relied upon his deposition, on file in these proceedings (R. 184), wherein he denied under oath having supported any racially-motivated policy of exclusion and testified that he favored the admission of petitioners on a non-discriminatory basis. See Appendix hereto, *infra* at pp. 9-10.

Without passing upon this motion, however, the District Court proceeded instead to hold that Wheaton-Haven is "a private club or other establishment not in fact open to the public" under 42 U.S.C. §2000a(e) and thereby exempt from coverage under the Civil Rights Act. No other question was considered or decided as the District Court, in acting upon Wheaton-Haven's motion for summary judgment, granted judgment for all respondents (Pet. App. C). The Fourth Circuit affirmed that judgment and denied rehearing *en banc* (Pet. App. B), but did not pass upon the points briefed and argued by McIntyre except to note that he "championed the cause of the admission of Dr. Press", one of the petitioners (Pet. App. B-30).

Following oral argument but prior to decision of the Fourth Circuit, McIntyre was defeated for reelection to the board of directors.

ARGUMENT

Because McIntyre did not raise the "private club" issue in the District Court or Court of Appeals, he takes no position on whether the decisions of those courts are consistent with principles enunciated in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Indeed, because he favors admission of petitioners without regard to race, as a matter of social policy, it is doubtful that a justiciable controversy exists between these parties.

In the event that certiorari is granted for reasons stated in the petition, it should be denied as to McIntyre or the judgment summarily affirmed on the basis that no personal acts of racial discrimination have been attributed to him. That the courts below found it unnecessary to reach this issue is immaterial. This Court may consider any position in support of the judgment in his favor, including contentions not passed on by the courts below, which find support in the record. *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931).

It is respectfully submitted that the complaint articulates no basis for relief against McIntyre or any other individual defendant. Although petitioners complain of the collective refusal by the corporation and its officers and/or directors to permit them use of the pool, the short answer is that one never incurs personal liability for corporate acts or policies "unless he specifically directed the particular act to be done, or participated or cooperated therein". 3 FLETCHER CYCLOPEDIA CORPORATIONS, §1137 (1965 ed.). "Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer

or agent of a corporation for the tort of the corporation". *Lobato v. Pay Less Drug Stores*, 261 F. 2d 406, 409 (10th Cir. 1958). Merely identifying one as an "officer and/or director" of the offending corporation is not enough. *McCoy v. Stroud & Co.*, 373 F. 2d 862, 865 (3rd Cir. 1967); *Lahr v. Adell Chemical Co., Inc.*, 300 F. 2d 256, 260 (1st Cir. 1962); *Phelps Dodge Refining Corp. v. F.T.C.*, 139 F. 2d 393, 397 (2d Cir. 1940). And conclusiory allegations in the complaint to this effect are equally insufficient to withstand a properly supported motion for summary judgment. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-290 (1968).

What is true with respect to actions at law for damages is equally applicable in suits for injunctive relief:

> "* * * [T]he officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunction as well as in the case of any other suit in equity." FLETCHER CYCLOPEDIA CORPORATIONS §4873 (1970 rev.).

And see *S.E.C. v. Union Corp. of America*, 205 F. Supp. 518, 521-522 (E.D. Mo.), affirmed 309 F. 2d 93 (8th Cir. 1962) (injunction against corporation not extended to officers and directors not shown to have acted in bad faith).

Although the question has never been squarely decided by this Court, there is uniformity of decision in the lower federal courts that corporate conduct which is actionable under civil rights legislation does not of itself impose personal liability upon individuals acting solely in a repre-

sentative capacity. Unless the complaint specifically alleges acts of personal wrongdoing, a claim is not stated against members of a board charged with acting improperly as a corporate body. *Derby v. University of Wisconsin*, 325 F. Supp. 163, 164 (E.D. Wis. 1971); *Lessard v. Van Dale*, 318 F. Supp. 74, 75-76 (E.D. Wis. 1970); *Abel v. Gousha*, 313 F. Supp. 1030, 1031 (E.D. Wis. 1970); *Schwartz v. Galveston Independent School District*, 309 F. Supp. 1034, 1037-1038 (S.D. Texas 1970); *Wesley v. City of Savannah*, 294 F. Supp. 698, 703 (S.D. Ga. 1969) (as to three defendants).

Since these precedents require dismissal as to a director joined as a party defendant but not charged with individual misconduct, McIntyre is presently entitled to such relief. Furthermore, he stands united with petitioners in his unflagging opposition to the racial policies challenged in this case, even if his commitment to conscience is not exacted by the law as construed and applied below.

The unpopularity of McIntyre's position sealed his defeat for reelection to the Wheaton-Haven board of directors. While retaining ordinary membership, he no longer occupies any official position in the corporate hierarchy and cannot participate in the board's decisions. Under analogous circumstances, an action to compel an official to perform a public duty is held to abate against the incumbent upon his retirement, although it may survive as to his successor. *Pullman Co. v. Knott*, 243 U.S. 447 (1917); *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897). Identical considerations apply here.

CONCLUSION

For the foregoing reasons, the judgment entered in favor of this respondent, E. Richard McIntyre, was correctly entered and should not be disturbed. Accordingly, as to said respondent, the petition for a writ of certiorari should be denied or, if granted, the judgment should be summarily affirmed.

Respectfully submitted,

JOHN H. MUDD,

H. THOMAS HOWELL,

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E. Richard McIntyre.

Of Counsel:

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April 1972.

APPENDIX

Extract from the deposition of E. Richard McIntyre, March 23, 1970 (R. 168).

* * * * * *

(38) Q. During your membership on the Board of Directors, have you proposed that the Board or the Association adopt a policy to exclude members or potential members on the basis of race or religion, or national origin, color, or similar circumstances? (39) A. My proposals have always been to the opposite effect.

Q. Have you ever voted in favor of a proposal which would exclude persons on the basis of their race or color? A. No.

Q. Have you, as a member of the Board of Directors, ever proposed a policy limiting guests or members to members of the white or Caucasian race? A. No.

Q. Have you ever proposed or voted in favor of a policy which would exclude Negroes or persons on the basis of race or color? A. No. My votes in that fashion have always been to the other side of the coin.

Q. With respect to the requests, formal or informal by or on behalf of Dr. and Mrs. Press, have you at any time sought unfavorable action with regard to their request for membership? A. Would you repeat that? I am not quite sure I understand.

Q. Let me put it in simple terms. Have you ever proposed or voted that the Association turn down Dr. and Mrs. Press on the basis of their race or color? (40) A. Oh, no, no.

Q. Have you voted to reject them as members for any reasons? A. No.

Q. Have you taken a contrary position with respect to them? A. Yes.

Q. What is that position, sir? A. That they ought to be members of the pool.

Q. Now, with regard to Mrs. Rosner — it is Mrs., is that correct?

(Mr. Brown) Yes.

By Mr. Howell:

Q. Have you ever met Mrs. Rosner? A. No.

Q. Have you ever proposed or voted against her becoming a guest of the Association, or have you acted in any way to deny her the use of the pool as a guest of a bonafide member? A. I don't believe I have.

Q. As a member of the Association, have you ever cast a vote one way or the other with respect to the admission or exclusion of guests or members on the basis of their racial— (41) A. Yes.

Q. Did you cast such a vote in the 1968 meeting in November 1968? A. I think I did.

Q. Can you recall the general nature of the vote and what your vote was? A. At that point and time the vote was as to whether or not the policy to admit guests only relatives of members, was taken, and I voted against that policy. This was at a general membership meeting in which I voted as a member, and I think I spoke as a member, although I was seated in an area where the Board of Directors were.

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